BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BOBBY G. BERRY
Claimant
VS.

BOEING MILITARY AIRPLANES
Respondent
AND

AETNA CASUALTY & SURETY
Insurance Carrier
AND

KANSAS WORKERS COMPENSATION FUND

Docket No. 129,500

ORDER

ON the 2nd day of November, 1993, the application of the claimant for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge Shannon S. Krysl, dated October 11, 1993, came on before the Appeals Board for oral argument by telephone conference.

APPEARANCES

Claimant appeared by his attorney, William L. Fry, of Wichita, Kansas. Respondent and insurance carrier appeared by their attorney, Vaughn Burkholder, of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Cortland Clotfelter, of Wichita, Kansas. There were no other appearances.

RECORD

The record is herein adopted by the Appeals Board as specifically set forth in the Award of the Administrative Law Judge.

STIPULATIONS

The stipulations are herein adopted by the Appeals Board as specifically set forth in the Award of the Administrative Law Judge. In addition, respondent advised it was not contesting the finding of the Administrative Law Judge of timely written claim, nor the finding that the claimant had experienced personal injury by accident arising out of and in the course of his employment after July 1, 1987.

ISSUES

(1) Whether claimant's accidental injury should be treated as one occurring before or after July 1, 1987.

(2) What is the nature and extent of the claimant's disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(1) The Appeals Board adopts the findings of fact and conclusions of law set forth by Administrative Law Judge Shannon S. Krysl in her Award dated October 11, 1993, that are not inconsistent with the findings and conclusions specifically set forth herein.

(2) The Appeals Board is unable to accept the opinions of Dr. Tyrone D. Artz regarding the impairment that claimant suffered as a result of his work related injuries with the Boeing Company as Dr. Artz said he did not first see claimant until May 26, 1990. When claimant saw Dr. Artz, he had been working for another

employer, Smith Fiberglass, since February or March, 1988. The Appeals Board finds that claimant experienced aggravation to his preexisting condition as a result of his work at Smith Fiberglass. Dr. Artz's opinion is relevant to claimant's injury sustained as a result of his work at Smith Fiberglass, but irrelevant pertaining to the injury that claimant experienced at the Boeing Company.

(3) Immediately prior to his termination, the respondent offered claimant a job transfer in an attempt to accommodate his restrictions and limitations. Claimant's undisputed testimony was that he would be transferred to second shift, be reduced in pay grade, and be required to work 12 hours per day, seven days per week. Claimant declined the position and terminated his employment. Claimant's testimony regarding the position offered, the reduction in pay, and the significant number of hours required to perform that job is uncontroverted.

(4) After his termination in August, 1987, claimant received bilateral carpal tunnel releases from Dr. Lucas. As a result of claimant's injuries at Boeing Company, Dr. Lucas rated the claimant as having a two percent permanent impairment of function to each hand and gave him permanent restrictions of no sheet metal work, no vibratory tools, no heavy lifting, and no repetitive lifting and grasping.

(5) The Appeals Board finds that the Administrative Law Judge correctly ruled that the date of accident should be claimant's last day of employment or August 28, 1987. Claimant testified that the symptoms to his hands increased each and every day up to his last day of work. A review of the medical records indicates that claimant first complained to Dr. Lucas of symptoms in his right hand in October, 1987. Claimant also testified that he did not have any trouble with his hands until April, 1987, when he injured his left ring finger. When reviewing the record as a whole, the Appeals Board finds that it is more probably true than not true that claimant's bilateral carpal tunnel condition developed into a permanent injury and disability after July 1, 1987.

(6) For injuries occurring on or after July 1, 1987, the extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience, and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than the percentage of functional impairment. In Schad v. Hearthstone Nursing Center, 16 Kan. App. 2d 50, 816 P.2d 409 (1991), the Kansas Court of Appeals held that this statute required the balancing of two factors: The ability to perform work in the open labor market and the ability to earn comparable wages. The Court must consider these factors to compute the percentage of the injured worker's disability.

Also see Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990), where the Kansas Supreme Court said that both the reduction of a claimant's ability to perform work in the open labor market and the ability to earn comparable wages must be considered in determining the extent of permanent partial general disability.

(7) The record contains little evidence for the Appeals Board to estimate within a reasonable degree of probability claimant's loss of access to the open labor market. However, it is evident that claimant would not be able to return to his former sheet metal duties at Boeing if he were to observe the restrictions set forth by Dr. Lucas. In addition, the Appeals Board is aware that claimant has lost access to a number of other occupations that exist in the open labor market that would require heavy lifting, vibratory tools, sheet metal work, or repetitive lifting and grasping which, in all likelihood, would equal or exceed the loss of ability to earn a comparable wage as found below. However, due to the lack of evidence pertaining to this prong of the Hughes, supra, formula, the Appeals Board is unable to give any weight to this factor and must limit its consideration to loss of ability to earn a comparable wage.

Based upon claimant's testimony, the Appeals Board finds that claimant has lost approximately ten percent in his ability to earn a comparable wage. This finding is based upon claimant's testimony regarding the wage he would have received had he accepted the position offered by respondent and the amount he was earning at the time of the accident.

The evidence presented is sufficient to establish that claimant has experienced permanent partial general disability greater than the two percent functional impairment rating provided by Dr. Lucas. After considering the evidence presented concerning loss of the open labor market and ability to earn a comparable wage, the Appeals Board finds that permanent partial general disability benefits should be based upon a work disability equivalent to the ten percent loss of ability to earn comparable wages. As decided in Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212 (1991), the ultimate decision concerning the nature and extent of disability is for the trier of fact.

WHEREFORE, based upon the above findings of fact and conclusions of law, the Appeals Board finds that claimant is entitled to the benefits as computed in the Award of Administrative Law Judge Shannon S. Krysl, dated October 11, 1993.

IT IS SO ORDERED.

Dated and mailed this ____ day of December, 1993.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: William L. Fry, 310 West Central, Suite 108, Wichita, Kansas 67202
Vaughn Burkholder, 700 Fourth Financial Center, Wichita, Kansas 67202
Cortland Clotfelter, 727 North Waco, Suite 585, Wichita, Kansas 67203
Shannon S. Krysl, Administrative Law Judge
George Gomez, Director